FOR ARGUMENT

No. 88-192

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MCKESSON CORPORATION,
Petitioner,
v.
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,
DEPARTMENT OF BUSINESS REGULATION, and
OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

McKesson respectfully submits this Reply in response to the State's Brief.[1]

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[1] McKesson's updated Rule 28.1 list is attached to this Brief as Appendix A.

The State adopts the Florida legislature's opinion that Florida's successive enactments of unconstitutional tax statutes should not cost Florida "even dollar one." (M.A. 62a) The State maintains that Florida, which has waived its sovereign immunity concerning tax refund actions, may successively enact unconstitutional tax statutes that discriminate against interstate commerce; may force a taxpayer to continue to pay the discriminatory tax while the taxpayer challenges the constitutionality of the statutes in protracted litigation; and, after the taxpayer succeeds, refuse to refund any portion of the unconstitutional taxes.

First, the State urges this Court to determine that the Eleventh Amendment bars the Court's jurisdiction to review the Florida Supreme Court's decision to limit a taxpayer's remedies so that the State can retain taxes it collected under a scheme that violates the federal Constitution. The State contends that the Florida Supreme Court should determine whether McKesson is entitled to any retroactive relief from Florida's violation of the Commerce Clause, not *initially*, before this Court's review, but *exclusively* and *finally*. Although the Court has revisited the Eleventh Amendment at various times over the years, the Court has always maintained that the Court has appellate jurisdiction to resolve finally constitutional or other federal questions.

Alternatively, the State urges this Court to abandon the Court's decisions concerning remedies for unlawful state tax statutes, and to allow the Florida Supreme Court to ignore this Court's applicable retroactivity doctrine. The State contends that Florida (and each of the other 49 states) may impose its own doctrine of retroactivity in enforcing the federal Constitution. Florida, therefore, may resolve that a taxpayer who successfully challenges Florida tax statutes on federal constitutional grounds is not entitled to any measure of retroactive relief, even though the State could not have justifiably relied on the constitutionality of its tax statutes.

The Florida Supreme Court in this case held that Florida had collected discriminatory taxes from McKesson under an unconstitutional tax scheme. The Florida court found that McKesson, as a distributor of alcoholic beverages, had suffered an economic loss as a result of a "tax scheme" that placed "a clear discriminatory burden on interstate commerce." (J.A. 422) The Florida Supreme Court in previous cases consistently had held that at least the taxpayers who challenged unlawful taxes were entitled to a refund. *See, e.g., Colding v. Herzog*, 467 So.2d 980, 983 (Fla. 1985); *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Osterndorf v. Turner*, 426 So.2d 539, 545-46 (Fla. 1982). In light of the Florida court's findings in this case, and its own tax refund decisions, the court could deny a tax refund to McKesson only by ignoring this Court's applicable decisions concerning remedies.[2]

I. THE COURT HAS JURISDICTION TO REVIEW McKESSON'S CLAIM FOR A REFUND

The State urges the Court to reverse its historic practice and policy and find that the Eleventh Amendment precludes jurisdiction in this case. The State's argument collides with the Court's essential constitutional prerogative: the Court's appellate review of state court decisions concerning constitutional or other federal law under the Supremacy Clause.

Indeed, the Court has never viewed the Eleventh Amendment as abridging its jurisdiction to review state court's treatment of federal constitutional issues. As early as *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court determined that a writ of error to the Supreme Court is not a "suit" against the state. 6 Wheat. at 406. The Court rearticulated that rule in this century in *General Oil Co. v. Crain*, 209 U.S. 211, 233 (1908):

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[2]The Court in this case does not have to resolve the broader question of whether, in the absence of a state refund remedy, federal constitutional principles compel states to return taxes that violate the Commerce Clause.

> [i]n determining what relief this court can or should give, in respect of the [state court] judgment under review, we need not consider the scope and meaning of the Eleventh Amendment; for, it was long ago settled that a writ of error to review the final judgment of a state court, even when a State is a formal party and is successful in the inferior court, is not a suit within the meaning of the Amendment.

See also Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821 (1824).

The Court's definition of its appellate jurisdiction has never followed the State's theory for the Eleventh Amendment. In *Smith v. Reeves*, 178 U.S. 436 (1900), the Court determined that the Eleventh Amendment barred a taxpayer's initiation of a tax refund suit in federal court. Nevertheless, Justice Harlan stressed that Eleventh Amendment cases have no bearing on the power of the Court to protect rights secured by federal law. *Id.* at 445. The Court emphasized that a state's consent to suit only in its own courts remains

> subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or reexamined . . . if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States.

Id. See also Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 470 (1945); *Great N. Life Insur. Co. v. Read*, 322 U.S. 47, 57 (1944) (majority opinion); *id.* at 61 (Frankfurter, J., dissenting); *Chandler v. Dix*, 194 U.S. 590, 592 (1904) (Holmes, J.).

The Court has consistently and emphatically exercised its appellate power to review state court decisions in tax refund cases implicating constitutional or other federal law issues. In many cases, the Court directly addressed the petitioner's arguments for a state tax refund. *See, e.g., Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 57 U.S.L.W. 4168 (1989); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275 (1972); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940). In other cases, although the Court has allowed state courts to address refund issues "in the first instance," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984), the Court has never questioned its jurisdiction finally to resolve federal issues, including the appropriate remedy. *See, e.g., Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987); *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983); *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983).[3]

The State's surprising assertion overlooks the Court's "longstanding, though unarticulated, rule that the Eleventh Amendment does not limit exercise of otherwise proper federal *appellate* jurisdiction over suits from state courts." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 256 n.8 (1985) (Brennan, J., dissenting) (original emphasis).[4]

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[3]*See also Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Williams v. Vermont*, 472 U.S. 14 (1985); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Central Mach. Co. v. State Tax Comm'n*, 448 U.S. 160 (1980); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952).

[4]The State of Arkansas makes the astonishing suggestion that Justice Brennan's views of the Eleventh Amendment support the Court's avoiding jurisdiction. Of course, Justice Brennan and three other members of the Court have maintained that the Eleventh Amendment does not restrict any federal court's jurisdiction over federal questions. *See* dissenting opinions of

The State cites *Ford Motor Co. v. Department of Treasury*, in which the Court merely determined that the federal district court did not have original jurisdiction over a tax refund suit.[5] Yet the State does not cite *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 57 U.S.L.W. 4168 (1989), in which the Court did not hesitate to assume jurisdiction over a Texas state court case involving a tax refund suit. Appellants in *Texas Monthly* expressly sought a refund of taxes paid under protest, alleging that the state tax violated the Establishment Clause. The Court found no basis for injunctive or declaratory relief in the case, but concluded that "[a] live controversy persists over Texas Monthly's right to recover the $149,107.74 it paid, plus interest." *Id.* at 4170. Finding the tax unconstitutional under the First Amendment, the Court reversed the Texas appellate court's reversal of the trial court's order of a refund. Similarly, the State cites *Atascadero*, in which the Court held that the Eleventh Amendment precluded an original action in federal court seeking retroactive monetary relief. The State does not, however, cite *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981), in which the Court readily granted appellate review of Indiana's unconstitutional denial of retroactive employment benefits.

Although the State's theory of the Eleventh Amendment cannot distinguish *Ford* from *Texas Monthly*, or *Atascadero* from *Thomas*, the Court's historic practice obviously does. The Eleventh Amendment applies to the federal courts' *original* jurisdiction, but not to the Court's

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Justices Brennan, Marshall, Blackmun, and Stevens in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), *Green v. Mansour*, 474 U.S. 64 (1985), *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468 (1987).

[5]The State ignores Justice Reed's conclusion that the state's consent to suit in its own courts "leaves open the road to review in this Court on constitutional grounds." 323 U.S. at 470.

appellate review of state court decisions on federal questions. Supreme Court appellate review over state court decisions on federal issues is mandated under Article III and the Eleventh Amendment. While lower federal courts cannot exert jurisdiction over nonconsenting state courts, the Supreme Court is empowered to review state court decisions that involve claims against the sovereign. This constitutional schema reflects the careful balance between federalism and sovereign immunity. Where a state has waived sovereign immunity, the state's courts initially may review both federal and state issues, generally without the lower federal courts' interference. The Supreme Court, however, may act to vindicate federal interests and ensure consistency among all courts on vital constitutional or other federal law issues. "By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985).

Scholars overwhelmingly support the view that the Eleventh Amendment poses no bar to this Court's appellate jurisdiction over state court decisions. Professor Wolcher emphasizes that "the Court has always considered itself uninhibited by the eleventh amendment in reviewing state court decisions in constitutional cases, even those involving substantial monetary liability of the state." Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 303 (1981). Similarly, Professor Jackson recently observed that "[t]he Supreme Court has routinely reviewed on the merits adverse judgments entered by state courts on claims for affirmative monetary relief made by individuals against states." Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L. J. 1, 14-15 (1988). Professor Tribe attributes the Court's consistent practice to the "supremacy of federal law [which] requires review of the federal questions presented in such suits." Tribe, *Intergovernmental Immunities in Litigation, Taxation,*

and Regulation: Separation of Powers Issues in Controversies about Federalism, 89 Harv. L. Rev. 682, 685 (1976).[6]

Florida has waived its sovereign immunity against taxpayers' constitutional claims for tax refunds. Under this Court's decisions, Florida necessarily understood that its waiver of sovereign immunity would entail this Court's ultimate review of Florida courts' rulings on constitutional or other federal law issues. The Florida courts have freely entertained McKesson's federal, as well as state, arguments for a refund of state taxes. Surely, the State may not now complain that this Court has no jurisdiction to review the Florida Supreme Court's decision.

II. THE FLORIDA SUPREME COURT FAILED TO FOLLOW THIS COURT'S DECISIONS CONCERNING REMEDIES

In light of this Court's opinions in tax refund cases and Florida's authorization of tax refunds, McKesson asked the Florida Supreme Court to apply retroactively the same Commerce Clause principles that the court applied prospectively.

McKesson in this case, like the taxpayers in *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931), invoked the right "to equal treatment." *Id.* at 247. McKesson, like the taxpayers in *Iowa-Des Moines*, was "subjected to discriminatory taxation through the favoring of others in violation of federal law." *Id.* McKesson asked the Florida court to provide the same measure of relief that this Court provided in *Iowa-Des Moines* and in other cases. Historically, the Court has not limited the injured taxpayers' relief to a prospective

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[6]*See also* Pagan, *Eleventh Amendment Analysis*, 39 Ark. L. Rev. 447, 452 and n.11 (1986); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1946 (1983); Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. Colo. L. Rev. 1, 9-10 (1972).

injunction. Rather, the Court has permitted the taxpayers to recover the unlawful taxes that the states had exacted. *See Maryland v. Louisiana*, 452 U.S. 456, 457 (1981); *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940); *Montana Nat'l Bank of Billings v. Yellowstone County of Mont.*, 276 U.S. 499 (1928); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446-47 (1923); *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285 (1912).

The State cites cases such as *Welsh v. United States*, 398 U.S. 333 (1970), *Califano v. Westcott*, 443 U.S. 76 (1979), *Orr v. Orr*, 440 U.S. 268 (1979), and *Heckler v. Mathews*, 465 U.S. 728 (1984), to establish that the Florida court, in curing the Florida statutes' discrimination, either could have extended Florida's tax preferences to the excluded class or could have withdrawn the tax preferences from the favored class. However, the State's citations only support the Florida court's prerogative in choosing the form of *prospective* relief, not the form of *retrospective* relief, to cure the statutes' unconstitutionality.[7] Indeed, in *Welsh v. United States*, 398 U.S. 333 (1970), Justice Harlan cites *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931), to support his conclusion in *Welsh* that the petitioner was entitled, retroactively, to equal treatment. *Welsh*, 398 U.S. at 362 (Harlan, J., concurring in result).

This Court, in *Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 57 U.S.L.W. 4168 (1989), considered a taxpayer's challenge to the constitutionality of a discriminatory tax exemption. The State of Texas, like the State in this case, argued that the taxpayer could not obtain a refund of unconstitutional taxes because the solution to the

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[7]McKesson never argued that the Florida court had to strike the entire statutes rather than sever the discriminatory provisions in ordering prospective relief. Therefore, the State's citations to cases such as *Field v. Clark*, 143 U.S. 649 (1892), *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), also are irrelevant.

unlawful tax preference was to sever the preference, not to extend it. *Id.* at 4169. The Court rejected Texas' argument. Notwithstanding the State's options concerning prospective relief, the Court held that the appellant was still entitled to pursue a recovery of the unconstitutional taxes. *Id.*

The State attempts to characterize McKesson's tax refund suit as an action for preferential treatment rather than for equal treatment. The State argues that McKesson is seeking the retroactive benefit of the unlawful tax preferences. The State adds that McKesson would not have actually received the unlawful tax preferences because of the Florida tax scheme's sliding tax rates. *Hypothetically*, if the State had taxed McKesson at the same rate as its favored competitors, the increased volume of favored products in the market would have, under the sliding scale, reduced or eliminated the tax preferences for everyone. McKesson would have received equal treatment and would not be in court today. *In fact*, the State did not treat McKesson's products the same as the favored products. The State discriminated against McKesson's products, and McKesson paid unconstitutional taxes.

The State acknowledges that Florida has waived its sovereign immunity and that Florida law specifically provides for tax refunds. The Florida courts, in numerous cases challenging Florida taxes under Florida law, have ordered the State to refund taxes to the injured taxpayers. For example, in *State ex rel. Palmer-Florida Corp. v. Green*, 88 So.2d 493, 495 (Fla. 1956), the Florida court, ordering a tax refund, echoed Justice Holmes' statement in *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280, 285 (1912), and stated that "[i]n this country where the citizen has paid good money illegally and has an election of remedies for recovery, he should be permitted to employ the most complete and expeditious remedy possible to recover" the taxes.

Nevertheless, the State argues that Florida conditions its waiver of sovereign immunity for refund actions upon the taxpayer's demonstration that the taxpayer actually bore the financial burden of the tax. The Florida court did not reject McKesson's claim for a tax refund because Florida had asserted sovereign immunity or McKesson lacked standing. Florida's general refund statute, section 215.26, Florida Statutes (1985), in fact, does not include any "pass-on" clause, but rather provides that the comptroller shall pay the tax refund to the person who paid the tax. (M.A. 23a) The State cannot dispute that McKesson, in fact, paid the discriminatory excise taxes on its products. The State's sole citation, *State ex rel Szabo Food Serv., Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973), which addresses a taxpayer's standing to sue, concerned an alleged taxpayer who "bore no tax liability." *Id.* at 532. In this case, the Florida Supreme Court expressly found that McKesson was liable for the challenged taxes and has "standing to litigate whether the allegedly discriminatory scheme has had an adverse competitive impact" on its business. (J.A. 416)

When the Florida court has made its decisions concerning invalid tax statutes prospective only, the court has almost always granted a refund to the taxpayers who actually challenged the statutes. *See, e.g., City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578, 580 (Fla. 1984); *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982). *But see Gulesian v. Dade County School Bd.*, 281 So. 2d 325 (Fla. 1973). In *Osterndorf*, the Florida Supreme Court applied Florida's equal protection clause and held unconstitutional a part of the state homestead tax exemption. The court held that the taxpayers who timely filed suit were "entitled to a refund of the amount of additional taxes they paid by reason of the denial of the enhanced exemption." *Id.* at 545. The court recognized the importance of enforcing equal treatment under the Florida Constitution and therefore granted effective relief despite the decision's impact on local government.

> We recognize this decision will have a significant impact upon local governmental entities, but the constitutional provision which contains the $25,000 enhanced homestead exemption

> does not authorize one category of residents of this state to be favored over another category of residents.

Id. at 545-46.

In summarily rejecting McKesson's claim for a tax refund, the Florida Supreme Court failed to consider the significance of the Commerce Clause's protection of interstate commerce. The Florida court failed to recognize that, as in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984), the federal constitutional issues were "intertwined" with state tax refund issues. Florida's retention of discriminatory taxes in violation of the Commerce Clause significantly undermines enforcement of the Commerce Clause. Florida law, of course, did not require the State's retention of the taxes. On the contrary, the Florida court had to construct a new retroactivity standard that conflicts with *Chevron*'s standard in order to avoid Florida's usual remedy for the State's collection of unconstitutional taxes: a tax refund.

III. IN LIGHT OF *CHEVRON*, McKESSON IS ENTITLED TO A REFUND OF UNCONSTITUTIONAL TAXES

In this century, the Court repeatedly has considered when courts may depart from the common law rule that judicial decisions operate retroactively. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court articulated a standard that implicitly acknowledges the historic rule of retroactivity but permits a court to avoid "penalizing" a party that has justifiably relied on the previous state of the law.

The Florida Supreme Court was not free to ignore *Chevron* in constructing its own standard to determine whether to apply settled Commerce Clause principles either retroactively or only prospectively. The 50 states may not independently construct 50 different standards concerning the retroactivity of a decision applying federal constitutional principles.

The Court has refused to "leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967).[8] The Court in *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, ___ U.S. ___, 109 S. Ct. 633 (1989), reaffirmed that principle in a civil tax case. In *Allegheny Pittsburgh*, the Court considered not only the constitutionality of certain West Virginia property tax assessments, but also the adequacy of the state supreme court's proposed remedy. *Id.* at 637. After holding that the assessments violated the Equal Protection Clause, the Court ruled that West Virginia was not free to construct its own remedy that did not provide meaningful relief for the federal constitutional violation. Similarly, Florida was not free to construct its own remedial standard, ignoring the *Chevron* standard, for the constitutional violation in this case. The Court's holding in *Allegheny Pittsburgh* – "that petitioners may not be remitted to the remedy specified by" the state supreme court – is appropriate in this case. *Id.*

The State erroneously argues that *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), establishes Florida's right to impose its own retroactivity doctrine, even when Florida applies federal law. "[*Sunburst*] merely holds that the Federal Constitution imposes no barrier to a state court's decision to apply a new *state* common-law rule prospectively only." *Mackey v. United States*, 401 U.S. 667, 698 (1971) (Harlan, J., concurring in part and dissenting in part) (emphasis added). "*Sunburst* does not, of course, suggest that [a court] may ignore constitutional interests in deciding whether to attach

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[8] *Cf. Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113, 119 (1935) ("We give great weight to the characterization of a tax, or the interpretation of a state law, emanating from the highest court of the State, but where a federal question is involved we are not bound by the label attached to the tax or the character ascribed to the law").

retrospective effect to a constitutional decision of this Court." *Lemon v. Kurtzman*, 411 U.S. 192, 200 n.2 (1973).

Chevron 's narrow exception to the historic rule of retroactivity permits a court in resolving a case to depart from the usual rule of retroactivity to avoid injustice to a party that had justifiably relied on the former state of the law. Therefore, in line with *Chevron*'s rationale, *Chevron*'s first and threshold test is whether the judicial decision at issue has established a new principle of law. *See, e.g., United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982); *Milton v. Wainwright*, 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting).[9]

To borrow the Court's words in *Chevron* and *Hanover Shoe*, the Florida Supreme Court's decision did not "establish a new principle of law" that effected "an avulsive change" in Commerce Clause doctrine. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), quoting *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 499 (1968). *See also Florida v. Long*, ___ U.S. ___, 108 S.Ct. 2354, 2361-63 (1988). Therefore, the State, for obvious reasons, does not want the Court to focus on *Chevron*'s threshold test. Instead, the State suggests that the Court first consider "equitable considerations" even though the Florida court's decision merely applied settled Commerce Clause principles. The State seeks to disassociate *Chevron*'s jurisprudential rationale from any discussion of retroactivity.

[9]McKesson in its initial Brief surveys the federal Circuits' applications of *Chevron*. A majority have expressly viewed *Chevron*'s first prong as a threshold test that must be met before the presumption of retroactivity can be overcome. Indeed, federal courts have been "emphatic in demanding novelty as a prerequisite to retroactivity analysis . . . ." Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. Rev. 745, 764 (1983). Most state courts considering prospectivity also require a threshold determination that the decision involves a clean break with former law. Moreover, scholars have interpreted the first prong of the *Chevron* standard as a threshold test for prospectivity analysis. *See* McKesson's Brief at 33-35.

The State's interpretation of *Chevron* would allow state courts, even in cases applying settled federal law, to review the consequences of their decisions and then decide not to make their decisions retroactive. The State's proposed standard would invite courts in all cases to legislate as well as adjudicate. *See Mackey v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring in part and dissenting in part); *James v. United States*, 366 U.S. 213, 225 (1961) (Black, J., concurring in part and dissenting in part); Mishkin, *The Supreme Court 1964 Term - Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 59-60, 65-66 (1965); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L.J. 907, 932 (1962).

The Florida Supreme Court's decision in this case did not establish any new principle of law. The Florida court applied settled Commerce Clause principles in holding that the challenged tax scheme unconstitutionally discriminated against interstate commerce. "[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively." *United States v. Johnson*, 457 U.S. 537, 549 (1982). Although Florida's Revised Florida Products Exemption may have been more ingenious than the original Florida Products Exemption, the Commerce Clause "forbids discrimination, whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940). The State, of course, did not petition this Court to review the Florida Supreme Court's unanimous decision holding the Florida statutes unconstitutional. Under the *Chevron* standard's threshold test, the Florida Supreme Court erred in refusing to apply the established Commerce Clause principles retroactively as well as prospectively.

Moreover, even if the Florida Supreme Court had established a new principle of law, and therefore had a justification for consideration of *Chevron*'s other prongs, an appropriate analysis under *Chevron*'s second and third prongs would have established that retroactive

operation of the court's decision would advance the Commerce Clause's protection of interstate commerce and would avoid inequities.

With respect to *Chevron*'s second prong, the Florida court failed to consider that the court's retroactive enforcement would advance the Commerce Clause's purpose whereas a denial of retroactive enforcement would encourage Florida (and other states) to enact unconstitutional legislation. The Florida court did not acknowledge the injury to Commerce Clause principles when states may violate the Commerce Clause with impunity. The Florida legislature's successive enactments of unconstitutional statutes exemplify the political reality that state lawmakers often succumb to substantial pressure from constituents to protect local commerce. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1114-15 (1986); R. Posner, Economic Analysis of Law § 26.3 at 602 (3d ed. 1986).

The Florida court failed to recognize that the court's allowing Florida to retain the discriminatory taxes on interstate commerce may encourage other states to enact protectionist legislation. *Cf. Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977); Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1114-15 (1986). Indeed, this Court's affirmance of the Florida court's resolution of this case, allowing the State to retain its discriminatory taxes, undoubtedly would fuel some state legislatures' efforts to favor local interests through protectionist legislation. *See generally Nippert v. Richmond*, 327 U.S. 416, 434 (1946). State legislatures – at no financial risk – could enact protectionist legislation that would endanger the Commerce Clause's creation of a national common market.

Finally, with respect to *Chevron*'s third prong, the Florida Supreme Court did not engage in an appropriate analysis of whether retroactivity would result in significant inequities.

The Court in *Chevron*, *Lemon*, and *Northern Pipeline* determined that retroactive application of a new legal rule would produce substantial inequity *because* a party had justifiably relied on the former legal rule. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 108 (1971); *Lemon v. Kurtzman*, 411 U.S. 192, 203 (1973); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982). Florida did not justifiably rely to its detriment on any Commerce Clause principle that the Florida Supreme Court overruled. Florida's successive enactments of unconstitutional statutes hardly make the State's equitable arguments compelling.

Also, the Florida court had no factual basis for its analysis of the financial significance of retroactivity on the parties. Rather, the Florida court purported to resolve the economics of Florida's taxes even though McKesson (and all other parties) had never addressed the issue in the lower court. In connection with its motions in the circuit court for a preliminary injunction and partial summary judgment, McKesson had not requested the court to determine the amount of a refund. The Florida circuit court, after determining the Florida tax scheme was unconstitutional, simply had declared that its ruling would operate only prospectively. The State never presented any evidence to any Florida court that a Florida tax refund to McKesson would impose any significant burden on the state. The State's horrific references in its brief in this Court to Florida's potential tax refund exposure to *all* taxpayers do not cite to the record in this case because no Florida court ever received or considered the figures.[10]

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[10]The State's suggestion that McKesson could have convinced the Florida courts to enjoin the Florida tax scheme before the State collected any unconstitutional taxes also has no basis in fact. Although McKesson expeditiously pursued every Florida procedure to end the State's enforcement of the challenged tax scheme, McKesson had to continue paying the full tax during the 20 months between McKesson's filing its suit and the Florida Supreme Court's issuing its mandate. *See* McKesson's Brief at 8-13.

The Florida court stated that McKesson probably had passed on the Florida tax to its customers and therefore a tax refund would be a windfall. (J.A. 430) However, neither the court in its opinion nor the State in its brief cite to any evidence in the record that would support their specious economic theory. The Florida court simply *speculated* that McKesson had passed on the burden of the tax. The court never reconciled its finding that McKesson suffered competitive harm as a result of Florida's discriminatory tax scheme with its statement that McKesson may have passed on the burden. (J.A. 416, 422, 425-27)

The Florida court's (and the State's) speculation contradicts the legislature's intent in enacting the statutes: to impose greater costs on interstate commerce to the advantage of local commerce. (J.A. 84, 106-09, 120, 127-30) If McKesson "passed on" a percentage of the discriminatory taxes through higher prices for its products, McKesson lost market share to local competitors distributing the favored products. The Florida legislature, of course, intended exactly that effect. Thus, the Florida Supreme Court's finding that the unconstitutional Florida tax scheme "strips away" from McKesson and other interstate competitors their "competitive and economic advantages" in order to benefit local competitors makes far more economic sense than its justification of its denial of any refund.[11]

Under Florida's tax refund statute, McKesson seeks to recover the "excess of taxes exacted from [it]." *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931). Under the *Chevron* standard, the State may not compel McKesson to bear the burden of Florida's unconstitutional taxes on commerce.

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[11]The State does not contest that the Court's reasoning in *Hanover Shoe* and *Illinois Brick* counsels against permitting the State to condition the right to a refund of unconstitutional taxes upon a proof of the economics of the taxes. *See* McKesson's Brief at 42-44.

CONCLUSION

McKesson respectfully prays that this Court reverse the Florida Supreme Court's final decree with respect to its denial of retroactive relief. McKesson is entitled to a tax refund of the discriminatory portion of the taxes that the State collected from McKesson under the unconstitutional Revised Florida Products Exemption.

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Respectfully submitted,

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Petitioner McKesson Corporation's Revised
Rule 28.1 List of Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries) and Affiliates

Armor All Products Corporation
Armor All Products of Canada, Inc.
Armor All Products GmbH
APC Chemicals, Inc.
City Properties, S.A.
Comercial Farmaceutica Interamericana, S.A.
Comercial Interamericana, S.A. (Dom. Rep.)
Comercial Interamericana, S.A. (El Salvador)
Comercial Interamericana, S.A. (Guatemala)
Computer Aided Systems, Inc.
Corporacion Bonima, S.A.
Corporacion Interamericana, S.A.
Distribuidores Especialdades, S.A.
Distribuidora Farmaceutica Calox Colombiana, S.A.
Intercal, Inc.
Investigaciones Farmoquimicas De Colombia, S.A.
Laboratorios Calox, C.A.
Medilog Corporation
Medilog GmbH
Organizacion Farmaceutica Americana, S.A.
PCS, Inc.
PCS of New York, Inc.
PCS Services, Inc.
Pharmaceutical Card System Canada, Inc.
Pharmaceutical Data Services, Inc.
SDC Distributing Corp.